INTERWORKINGS OF STATE ADMINISTRATION AND DIRECT LEGISLATION

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Executive participation in the work of American legislatures has been frequently analyzed. Its increasing extent in recent years is closely interrelated with two other factors in the development of our state governments: first, the greatly enlarged tasks which the American public has come to exact of its legislatures, and second, the successive restrictions which have been placed upon these bodies. Though there has been a steadily growing dissatisfaction with the methods and motives of our representative organs—which has been voiced in certain restrictions imposed upon legislative freedom, such as requirements affecting procedure, limitations upon special and local legislation, the regulation of lobbying and the placing of matters of statutory character in constitutions—there has at the same time developed a need for constantly increasing reliance upon legislative regulation as a means of securing economic and social reforms. This expansion of the sphere of legislative competence and the increase of the limitations placed upon legislative activity have accentuated and made obvious the need for responsible leadership in the fulfilment of the manifold and complex duties which modern demands impose upon our state legislatures. This demand for responsible leadership has found its response in increasing participation of the executive in legislation.

The need for strong legislative leadership has existed since the beginning of our state governments. The American disjunction of executive and legislative organs left the latter without guiding and responsible agencies to discriminate among the tasks proposed to the legislatures, or to coördinate their efforts. Inevitably, to meet this need, agencies of leadership, not responsible under the constitution or the law, were in time created or accepted by the legislatures. Thus legislative committees—as, for example, the committee on rules, leaders of the party caucus, unofficial leaders

outside the legislature, were allowed in various ways to assume the functions of devising and executing plans of action for the legislative sessions. The agencies just indicated in many cases proved adequate for the work of preserving party unity and party subservience of individual members to the organization. None of these devices could satisfy the fundamental need—from the standpoint of the public, rather than of the political party—for an open, responsible, and unified leadership in legislation. The records of the governors who first perceived their opportunity to fill this gap and at the same time assume the positions of party guides, are familiar. The special fitness of a governor, properly equipped and with the appropriate motives, for such combined leadership, lies in the peculiar opportunities his position affords him for ascertaining or drawing out public opinion, for giving it definite expression, and for bringing to bear its force upon an otherwise irresponsive legislature.

But the legislature's irresponsiveness and uncertainty of action had been a primary cause for the introduction of the system of direct legislation, which was popularly demanded not only as a means for correcting the action of the legislature when it was corrupt or wilfully neglectful of the popular will, but also as a means for securing quick accomplishment of popular desires for legal regulation of economic, social, and moral conditions.

What effects will the extending use of the instrumentalities of direct legislation have upon the governor's position as legislative guide and party chief? What effects will their operation have upon the work of the governor and other state executive officers as directors of the vast administrative business which now devolves upon the state government, as a consequence of the expanded sphere of state regulation? The experiences of the states in which the system of direct legislation has been in operation provide us with material for indicating a few possibilities and tendencies along the lines of such questions, without approaching any final and fundamental conclusions.

On the one hand, with regard to the interworkings of direct legislation and executive participation in lawmaking, several practical questions arise out of the experiences of the last few years.

In the first place, the question may be raised whether, in order to make possible the exercise of intelligent judgment upon measures

submitted to direct vote, the governor must be looked upon as the guide whose task it will be to concentrate popular attention upon a few salient measures among the manifold propositions which may be submitted under the unrestricted employment of the instrumentalities of direct legislation. Much emphasis has been placed upon the multifariousness of the propositions submitted to popular vote, upon the resulting confusion of the mind of the electorate, and upon the tendency of such methods of political action to discredit popular rule by weakening its representative organs and by bringing further inexpertness and incoherence into our lawmaking. It is urged that in direct legislation as in representative legislation there is need for some responsible agency to assemble and make selection from the manifold legislative proposals emanating from limited groups of voters. Through the machinery of direct legislation as through that of our representative assemblies the total of legislative projects tends, it is held, to represent a collection of special and limited interests rather than a consolidated general interest. It is thus predicted that direct legislation without leadership will produce the same defects of irresponsibility and incongruity that have characterized legislation under the procedure of our typical representative legislatures. If there must be a conspicuous guide whose task it will be to propose and determine a program for popular legislation and to give to it generality and consistency, can the governor or some other state officer serve in such capacity?

To meet the need just indicated, an extreme suggestion has been made that the popular initiative should be allowed to apply only to measures which the governor has recommended to the legislature but which have failed of enactment in that body. In other words, the popular "initiative" should be restricted to a selection among measures proposed unsuccessfully by the governor to the legislature. This restriction would abolish altogether the popular origination of legislative proposals, and therefore cannot be considered as a means for guiding and safeguarding the use of popular initiative in legislation. The governor, through his power to awaken public opinion, can direct its attention to measures which he deems more important among the collection of measures offered for submission to popular determination. But no practical device seems available for conferring upon him or any of his col-

leagues legal powers of elimination among such proposals, without sacrificing the primary and radical purposes of popular legislation.

In the second place, shall the governor, as part of his province as responsible political head of the state, be empowered to set in motion upon his own initiative the machinery of direct legislation as a further means for pressing his legislative suggestions towards enactment into law? One governor has, without any formal authority of such character, but simply through his personal influence, secured popular decision upon measures which he had sponsored unsuccessfully before the legislature. Professor Barnett has pointed out that in 1912, because of the failure of the Oregon legislature to enact certain "good roads" legislation desired by the governor, the latter, upon his own responsibility, appointed committees to prepare measures and to obtain petitions necessary to require the submission of these measures to popular vote.[1] The same procedure was followed with respect to a "blue sky" bill and a "millage-tax" bill for the higher state educational institutions, submitted at the same election. Professor Barnett adds: "The governor was also largely responsible for the submission of the anti-capital punishment bill at the same election, and he was the real author of the bill for the consolidation of the desert land board and the state land board submitted at the next election." It may be added that each of these measures was defeated at the polls.

Various proposals have been made for attaching to the system of direct legislation provisions which would specifically extend the governor's powers of leadership in legislation. It has been proposed that the governor should be given power to initiate measures for submission to popular vote, without the intervention of any legislative action or popular petition. A more practical form of this proposal might be that the governor should be authorized to refer to popular vote any measure recommended by him to the legislature and failing of enactment by that body. Other suggestions have called for the automatic reference to popular vote of all measures rejected by the legislature after recommendation by the governor. It is argued that some such addition to the governor's power is necessary in order to give logical and practical completeness to the function which, with the acquiescence of public opinion,

[1] James D. Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon*, p. 12.

he is coming to assume as responsible political head of the commonwealth.

Thirdly, should officials of the state administration be vested with powers of determining the validity and sufficiency of petitions submitted for the initiation or reference of laws? In view of the aggressive leadership in legislation now so frequently assumed by the state administration, we are confronted by the practical question as to whether these officials, in their eagerness to protect measures which they have conducted successfully through the legislature from attack through the referendum, may not be tempted to exercise their powers of decision in the matter of petitions in such arbitrary ways as to prevent or obstruct the submission of such laws. In most states it is required that the petitions for the initiative or referendum be filed in the office of the secretary of state. This requirement generally carries with it the duty of that official to pass upon signatures the validity of which is questioned. That the exercise of such power may become involved in the political and legislative aims of the administration was revealed in connection with the investigation conducted by the secretary of state of Ohio upon the referendum petitions submitted in 1913. The methods and consequences of this investigation deserve consideration in some detail.

The system of state-wide initiative and referendum was established in Ohio in 1912 by constitutional amendment. In 1913 petitions were circulated for a referendum upon three of the acts passed by the legislature of that year. Neither constitutional nor statutory provisions in force at that time, affecting petitions for the initiative or referendum, established practical means for preventing or detecting fraudulent practices in making or soliciting signatures. Two of the acts upon which a referendum was sought were among the more important achievements of the extensive program of social and administrative legislation enacted by the Democratic legislature of 1913, under the guidance of Governor Cox. These two measures were an act establishing compulsory workmen's compensation through a system of state insurance, and an act substituting centrally appointed for locally elected tax assessors. The chief agency in the circulation of the petitions against these laws was the Ohio Equity Association, an organization representing certain industrial insurance companies and formed

for the purpose of securing the reference and defeat of the laws mentioned above. Accusations of fraud and corruption in connection with the circulation of the petitions were made to the governor, and at his direction a hearing upon the sufficiency of the petitions submitted was held by the secretary of state. The hearing brought out unmistakable evidence that extensive frauds had been committed and that practically every constitutional and statutory requirement affecting petitions had been wilfully disregarded. Many non-voters had been induced to sign; many names had been copied by circulators from city and telephone directories, hotel registers and poll lists; and many signatures had been obtained by payments to the signers or by misrepresentation of the contents of the petitions. Moreover, many abuses were disclosed in connection with the attestations by notaries public to the affidavits required to be made by the solicitor and attached to each part petition; these abuses were such as the failure of the notary to swear the solicitors, or swearing them by proxy, or swearing the solicitors when the notary had good reason to believe that names on the petition were forgeries.

Despite the large number of invalid signatures disclosed in the hearing before the Ohio secretary of state, there was a widespread popular feeling that the administration had displayed undue industry in throwing out questionable signatures and that it had taken advantage of the existence of fraud to throw out many petitions which were of only doubtful validity at worst. The secretary of state in his decisions and the attorney-general in his rulings were accused of using the powers of their offices, at the behest of the governor, to forestall arbitrarily the referendum. The governor's motive was considered to be determined by his fear of the test of a popular referendum upon the acts in question and in his desire to secure at all costs the power which would come to him from the patronage conferred by the tax assessor law. As a result of the secretary of state's decisions in the hearing the number of signatures adjudged by him to be valid was far short of the constitutional requirement. The secretary of the Ohio Equity Association applied to the supreme court of the state for a mandamus to be directed against the secretary of state to compel him to place the laws upon the ballot. The court refused to issue the writ, upholding the attorney-general's ruling that the secretary of state, as state super-

visor of elections, has authority to determine the sufficiency and validity of petitions filed with him, and that his decision thereon is final, unless such decision has been fraudulently or corruptly made or unless he has been guilty of an abuse of discretion; and sustaining also the attorney-general's ruling that a false affidavit or an imperfect swearing by the notary invalidates all signatures upon the part of the petition in question. This decision was rendered by a vote of five to one, the dissenting judge being the sole Republican judge on the supreme bench and the five majority judges including four Democrats and one Progressive.

In 1914 a special session of the Democratic legislature of Ohio passed a law to provide further safeguards for initiative and referendum petitions. The object of this law was to prevent a repetition of the frauds, but not of the executive interference, that appeared in connection with the petitions of 1913. This law established strict requirements as to the form and arrangement of petition blanks, required a statement of receipts and expenditures by circulators of petitions to be made before elections, provided penalties for methods such as those practised by circulators in 1913, and made provision for a preliminary local examination of petitions by county boards of election; these boards were not given powers of final decision but were required to report to the secretary of state cases of invalid signatures and illegal practices which they might discover.

Executive interference in legislation was a dominant issue in the state election of 1914 in Ohio. The Republican attacks upon the record of Governor Cox, who was a candidate for reëlection, were directed partly to his activities in securing legislation consolidating and centralizing state administration, and partly to his policy of executive interference in legislation. This latter attack drew attention not only to his dominating leadership of the general assembly, but also to his part in blocking the referendum against two of his cherished laws, one of which greatly extended his powers of central administrative control. The Republicans were victorious in the election of 1914; and it is generally believed that the governor's activity in connection with the petition hearings of 1913 was an important factor in causing his defeat.

The Ohio Republican legislature of 1915 repealed the tax assessor law which had been withheld from the referendum. They

also passed a law giving to local tribunals final power in deciding upon the validity and sufficiency of petitions. This law provides that if the county board of election find any signatures insufficient, it shall, after notifying the persons concerned with the solicitation of those signatures, proceed to establish the insufficiency of the signatures before the court of common pleas of the county, whose decision shall be final. The county board is required to return the petitions to the secretary of state, with a certification of the total number of valid signatures on such petitions. The number so certified must be used by the secretary of state in determining the total number of valid signatures, which he is merely to record and announce. Thus power is withdrawn from the secretary of state to further the legislative aspirations of the administration by interfering with the application of petitions; unless the supreme court should hold that the statute cannot withdraw from the secretary of state power of judgment upon the validity of petitions, since such powers may be held to attach to him as a necessary implication from the constitutional provision requiring that the petition be filed in his office. It is probably desirable that such powers be wholly withdrawn from any state executive officer in order to relieve the administration of suspicion of prejudiced action. This is important in view of the aggressive leadership in legislative policy which governors sometimes incline to assume nowadays.

Recent centralizing laws in some states give the officers of state administration many subordinates in the various localities. A further consideration on the interworkings of state administration and direct legislation relates thus to the question whether this condition places dangerous powers in the hands of state administrative officers to further their legislative ends by exerting influence over their subordinates to promote the circulation of petitions.

Here again a recent experience in Ohio affords illustration for the question in point. The Republican legislature of 1915 passed a law upsetting the state liquor license commission which had been created by the Democratic legislature of 1913, and substituted local selection for state appointment of county liquor license commissioners. One of the members of the state liquor license commission who would be deprived of office by the new law, brought the pressure of his influence over the local commissioners in such a way as to secure their active coöperation in the circulation of petitions

against the liquor license ripper law of 1915. This law was defeated at the referendum and the law of 1913 was thus preserved and the state commissioner above mentioned maintained in office. After the election, the Republican governor who had been advocate and supporter of the new liquor license law, charged the commissioner with gross misconduct in office in urging his subordinates to use their influence with saloon keepers in such a way as to promote the securing of signatures to the referendum petitions, and ordered his removal from office. The supreme court, however, by a majority decision of the Democratic judges over the dissenting opinions of the minority Republican judges, restored the commissioner to office on the ground that the activities of the latter did not constitute gross misconduct in office. A decision uninfluenced by the partisan differences arising out of the issue of centralization of state government would probably have sustained the governor's removal. Nevertheless, the incident reveals ways in which officials of the state administration under a centralized system may be tempted to use their powers over local subordinates to promote attacks upon measures enacted by the legislature against their opposition. Under normal circumstances, public opinion will doubtless prove an adequate check to abuses of this nature.

It has been proposed to provide the governor with a regular way for obtaining popular decision when he unsuccessfully opposes measures coming from the legislature. This proposal calls for the automatic reference of all vetoed bills directly to the people in lieu of the return of such bills to the legislature, as at present.[2] It is argued that where the governor discovers defects in any bill sufficient to warrant his veto, the people, rather than the legislature which originated the bill objected to, should determine the conflict of opinion between governor and legislature.

A final consideration as to the consequences of direct legislation for the governor's position as legislative leader presents the question as to whether his position may be weakened by the opportunities which the system of direct legislation presents to adverse factions or interests to upset his legislative program. We have noted above that it was only by dogged persistence through possibly unfair means, on the part of Governor Cox that three of his measures were saved from attack by the referendum in 1913; and it is widely believed,

[2] Barnett, *The Initiative, Referendum, and Recall in Oregon*, p. 126.

by supporters as well as opponents of his policies, that two of those measures would have been defeated had the referendum been allowed. Furthermore, in 1915 two of the enactments for which Governor Willis had, in a less aggressive and open manner, stood sponsor before the legislature and the public, were defeated at the polls in the November election. It is obviously improper for the state administration to seek to protect its legislative program from outside attack, through its control over the machinery of petitions and elections or through its influence over local subordinates. Nor does there appear to be a practicable way whereby formal powers can be conferred upon the governor or his colleagues to defend their legislative achievements from interference through legitimate use of the referendum. It can only be suggested, therefore, that in so far as we approve executive leadership in the work of the legislatures we must also accord to the executives a tolerant hearing when they appear before the public as speakers in support of measures which, having been promoted by them successfully through the legislature, are subjected to the further test of a popular referendum.

The other side of the question of the interworkings of direct legislation and state administration relates to the effect of popular lawmaking upon administrative efficiency. Examination of the character of measures submitted by popular petition reveals that it is not only matters of social and economic policy or of general political structure, upon which the people demand the privilege of expressing direct voice. Some measures which have been popularly initiated relate to matters of administrative policy and some are of a semi-technical character. Thus during 1914 measures of the following titles were submitted by initiative petitions: regulating the placing, use and maintenance of electric poles, wires, cables and appliances;[3] creating a state board of drugless practice;[4] regulating requirements of dentists to practice in the state; creating a tax code commission to be appointed by the governor; consolidating the corporation and insurance departments.[5]

It is peculiarly in such matters of administrative legislation that constant and intimate communication between administrative

[3] In Arizona; adopted.

[4] In California; defeated.

[5] The three measures last enumerated were submitted in Oregon and were defeated.

heads and lawmaking authorities is required throughout the process of formulation and discussion of proposed laws. The neglect of our legislatures, when engaged in enacting laws affecting the forms and functions of administrative offices, to utilize the expert information and correction which they were in position to obtain from the actual administrators of these offices has been a primary factor in producing the inefficiency and wastefulness in our state administration, to which we so frequently point in dismay. Where administrators and lawmakers are at so much greater distances from one another, as must be true where the lawmakers are the voters acting directly in their various precincts, it is perhaps natural to question whether our administrative organization is not in danger of being further weakened by ill-coördinated extensions and modifications.

Two considerations would seem to determine the answer to the question just put, so far as it relates to the possibility and occasion for introducing further safeguards against the use of the instrumentalities of direct legislation upon matters of administrative and technical character. In the first place, beyond the exclusion of tax levies and appropriations from the operation of the initiative, it does not seem possible to discover a satisfactory basis for discriminating with any approach to practical and legal precision between laws, on the one hand, which relate to fundamental and general structure and policy and are, therefore, susceptible to reasonable judgment on the part of voters acting directly, and, on the other hand, laws which are of such technical and supplementary character, requiring specialized knowledge for their proper estimation, that they cannot be adequately judged by the mass of voters even under the tutelage of administrative leaders who may seek to inform them through the press and upon the platform. In the second place, examination of the subjects of measures upon which the operation of direct legislation is actually invoked does not disclose that we are in serious danger of extended misapplication of the system by using it for legislation of mere administrative and technical consequence. Titles of the character listed above, by way of giving illustrations of administrative matters to which direct legislation has been applied, are relatively few in number. The people do not frequently become interested in promoting or defeating legislation of such character.

To approach more nearly to a discovery of the ultimate effects

of direct legislation upon the operation of state administration we must revert to the subject of executive participation in legislation. We have noted that coöperation of the administration in the work of the state legislatures has been in some instances followed up by activity in the paths of direct legislation and that proposals have been put forward to facilitate this kind of activity. The accumulation of legislative duties upon the governor, the absorption of his attention in matters of legislative policy and tactics, make more indispensable a reconstruction and simplification in our state administrative machinery. If the governor is to become more of a legislative leader, two conditions are essential to make him a more responsible and effective director of administration. In the first place, state administration must be so consolidated as to unify and clarify his tasks as administrative leader; in the second place, the principles of expertness and permanency of tenure in the civil service must be so extended as to relieve him from the distractions attending the disposition of patronage and to provide him with a body of trained and reliable subordinates.

Thus through executive participation in legislation problems of direct legislation are interrelated with the problems of merit and standardization in the civil service, centralization and consolidation of administration, and the short ballot. Those who advocate the closest consolidation of our state government—to the extent of placing legislative and executive powers and responsibilities in the same hands, point to the initiative and the referendum as adequate safeguards against dangers of arbitrariness and venality that might otherwise make such a combination undesirable.